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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHRISTINE DOUGHERTY,

Plaintiff,

v.

AMCO INSURANCE COMPANY, and DOES
ONE through TWENTY, Inclusive,
Defendant.

) CASE NO. C 07-01140 MHP
)
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **DEFENDANT AMCO INSURANCE**
) **COMPANY'S OPPOSITION TO**
) **PLAINTIFF'S EX PARTE REQUEST TO**
) **CONTINUE HEARING ON MOTION FOR**
) **SUMMARY JUDGMENT**

Defendant AMCO Insurance Company ("AMCO") submits the following memorandum of points and authorities in opposition to the ex parte request of Plaintiff Christine Dougherty ("Plaintiff") to continue the hearing on AMCO's motion for summary judgment or, in the alternative, partial summary judgment.

I. INTRODUCTION

Plaintiff's request suggests that AMCO's pending motion took her by surprise, that the motion may not be proper, and that she should be given the opportunity to conduct certain depositions so as to prepare her opposition. But her request ignores the fact that Plaintiff and her counsel know, and have known for years, all the factual information underlying AMCO's motion and that no discovery is necessary to any opposition she might offer. Plaintiff's request is rife with falsehoods and failures to state other pertinent truths about this litigation and its background facts. Her request should be denied.

1 **II. ARGUMENT**

2 **A. Plaintiff's Ex Parte Request Is Improper**

3 This Court's Civil Local Rule 7-10 states:

4 Unless otherwise ordered by the assigned Judge, a party may an
 5 *ex parte* motion, that is, a motion filed without notice to opposing
 6 party, only if a statute, Federal Rule, local rule or Standing Order
 7 authorizes the filing of an *ex parte* motion in the circumstances and
 8 the party has complied with the applicable provisions allowing the
 9 party to approach the Court on an *ex parte* basis. The motion must
 10 include a citation to the statute, rule or order which permits the use
 11 of an *ex parte* motion to obtain the relief sought.

12 Plaintiff's *ex parte* request to continue the hearing date of AMCO's motion for summary
 13 judgment is devoid of any reference to the statute, rule or order that permits the use of an *ex parte*
 14 motion. Indeed, the only indication that Plaintiff gives that her *ex parte* request is proper is the
 15 statement of her counsel that he left a message for Judge Patel's clerk regarding whether an
 16 *ex parte* request for continuance of the hearing was proper and that *the absence of any response*
 17 *from the clerk* was confirmation that the *ex parte* request was proper.

18 Plaintiff's request should be denied because it is improperly made.

19 **B. Plaintiff and Her Counsel Already Know the Facts Needed to Oppose**
 20 **AMCO's Motion for Summary Judgment**

21 Plaintiff's request rests on the false premise that she has not had the opportunity to gather
 22 information needed to oppose AMCO's motion for summary judgment. But Plaintiff and her
 23 counsel became involved in the dispute presented by this litigation long before she filed this
 24 lawsuit and they conveniently forget to tell the Court the whole truth.

25 As set forth in AMCO's motion for summary judgment,^{1/} Plaintiff was involved in an
 26 automobile accident on April 17, 2001. Her present counsel have been aware of the issues
 27 involved in this litigation since at least April 16, 2002 when they filed suit on behalf of Plaintiff
 28 against the other driver involved in that accident; that case settled in December 2002. In

29 ^{1/} All of the facts summarized in this section are set forth in AMCO's motion for summary
 30 judgment, with supporting declarations and exhibits. For the sake of brevity, the supporting
 31 declarations and exhibits will not be reproduced here. (Declaration of Liberatore, ¶2.)

1 January 2003 Plaintiff's counsel advised AMCO that Plaintiff wished to file an underinsured
 2 motorist claim and in July 2003 they submitted a settlement demand and information in support
 3 thereof to AMCO. In August 2003 AMCO claims personnel requested additional information
 4 from Plaintiff, some of which her counsel provided and the rest of which her counsel stated he
 5 would provide; no additional information was ever provided. In November 2003 AMCO advised
 6 Plaintiff's counsel that the information submitted in support of her claim did not indicate that she
 7 was entitled to any underinsured motorist coverage benefits, and invited Plaintiff's counsel to
 8 submit additional information. Again, no additional information was provided.

9 AMCO renewed its request for additional information *eight* more times, but neither
 10 Plaintiff nor her counsel responded. In September 2004, AMCO advised Plaintiff and her counsel
 11 that it was closing its file; in apparent response thereto, in November 2004 Plaintiff invoked the
 12 arbitration provisions of her AMCO policy to resolve the issue of the value of her underinsured
 13 motorist claim. AMCO agreed to proceed to arbitration.

14 The parties then engaged in the arbitration process and an arbitration hearing before the
 15 Honorable Alfred Chiantelli, Judge (ret.), in January 2006. Throughout that process AMCO
 16 maintained that no underinsured motorist coverage benefits were due to be paid to Plaintiff
 17 because she had been adequately compensated for the injuries she allegedly sustained in the auto
 18 accident by the settlement reached in her lawsuit against the other driver (and by the "med-pay"
 19 benefits paid by AMCO).

20 In advance of filing the instant request, Plaintiff's counsel explained to the undersigned
 21 that he wished to depose certain AMCO claims personnel to learn "why AMCO made no effort to
 22 settle" Plaintiff's underinsured motorist claim. (Decl. of Liberatore, ¶3.) Given the above-
 23 described history, one cannot help but wonder how Plaintiff's counsel can believe that AMCO
 24 made no such effort, and what information he believes he will obtain via depositions that he does
 25 not already know based on his own participation in the making and handling of Plaintiff's

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1 underinsured motorist claim and the arbitration process.^{2/} AMCO contends that Plaintiff, or
 2 probably more precisely her counsel, has all the information needed to oppose AMCO's motion
 3 for summary judgment but make the instant request to prevent the Court from hearing and ruling
 4 on the motion.

5 **C. Plaintiff Has Been Dilatory in the Prosecution of This Lawsuit**

6 Plaintiff filed this lawsuit on January 24, 2007 in the Superior Court of California, County
 7 of San Francisco, and served Defendant AMCO on January 25. Under California Code of Civil
 8 Procedure section 2025.210(b), Plaintiff could have noticed depositions as early as February 14
 9 without leave of court; Plaintiff did nothing.

10 On February 26, AMCO removed the case to United States District Court, Northern
 11 District of California; the case was assigned to Magistrate Judge Wayne D. Brazil. Per
 12 Judge Brazil's initial order, the parties were required to make their initial disclosures pursuant to
 13 Federal Rules of Civil Procedure, Rule 26 on May 29. AMCO made its initial disclosures;
 14 Plaintiff did not, and to date, has not made its required initial disclosures. (Decl. of Liberatore, ¶4.)

15 Also on May 29, the parties were required to and did file their Joint Case Management
 16 Statement, at which time, and for the first time, Plaintiff advised that she refused to consent to the
 17 assignment of the action to a United States Magistrate Judge for trial. On May 30, this Court
 18 ordered that the case management conference that was scheduled for June 4 (before Judge Brazil)
 19 be vacated and that the case be re-assigned Judge Marilyn Hall Patel.

20 AMCO filed its motion for summary judgment precisely because it does not believe the
 21 underlying facts are in dispute and that the case can and should be resolved by the motion and
 22 without the need to engage in expensive and time-consuming discovery. (Decl. of Liberatore, ¶5.)
 23 In her request, Plaintiff claims that "[d]ue to the nature of an insurance bad faith claim, most of the
 24 evidence supporting plaintiff's allegations is in the exclusive possession of defendant." Such

26 _____
 27 ^{2/} On June 1, 2007, AMCO produced to Plaintiff's counsel all non-privileged documents
 28 included in its initial disclosure pursuant to Federal Rules of Civil Procedure, Rule 26. These
 included AMCO's claim file and claims personnel diary notes regarding their handling of
 Plaintiff's claim.

1 statement is overly broad and Plaintiff offers no specific example of what information AMCO has
 2 that she does not have and that she needs to oppose AMCO's motion. As stated above, one is
 3 hard-pressed to imagine, given Plaintiff's and her counsel's lengthy involvement with the issues
 4 presented here, what information they do not already possess that is needed to oppose the motion.

5 Plaintiff has already had more than four months to notice and take the depositions of
 6 persons she believes have information pertinent to this action, yet she has done nothing to obtain
 7 their testimony. Further, Plaintiff has ignored her obligations under Federal Rules of Civil
 8 Procedure and Judge Brazil's calendaring order to make the required initial disclosures. Now she
 9 wants another six months to conduct discovery. The Court should not reward such behavior.

10 **D. AMCO Did Not Violate Judge Patel's Standing Order**

11 Plaintiff argues that AMCO's pending motion violates Judge Patel's Standing Order No. 4,
 12 which states: "Motions to dismiss shall not be filed before the initial Case Management
 13 Conference except by leave of court." Plaintiff also claims, falsely, that "Judge Patel's clerk
 14 represented to plaintiff's counsel that the requirement to obtain such leave applied to 'all
 15 dispositive motions' and that defendant failed to obtain leave prior to filing its motion for
 16 summary judgment." (Plaintiff's Request at 2:12-14.)

17 But AMCO's motion is one for summary judgment or, in the alternative, partial summary
 18 judgment, not a motion to dismiss. Judge Patel's Standing Order No. 7 specifically addresses
 19 motions for summary judgment, thus establishing that motions to dismiss are not motions for
 20 summary judgment and that Judge Patel knows the difference between the two.

21 More troubling, however, is Plaintiff's counsel blatant misrepresentation regarding what
 22 Judge Patel's clerk supposedly told them. The above-quoted statement from Plaintiff's brief
 23 cannot be misread: Plaintiff, or more precisely her attorneys, claim that Judge Patel's clerk told
 24 them that Standing Order No. 7 applied to "all dispositive motions," their use of quotation marks
 25 indicating that the phrase was the clerk's phrase. However, facing the penalty of perjury, in his
 26 declaration Plaintiff's counsel tells the truth, stating that he left a message for Judge Patel's clerk
 27 asking whether Standing Order No. 7 applied to motions for summary judgment and concluded,
 28 *from the absence of any response from the clerk*, that his preferred interpretation of the rule was

1 correct. (See Decl. of Graham, ¶6.)

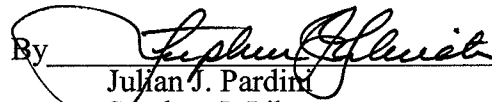
2 Apparently Plaintiff's counsel concluded that telling the truth would not support their
3 request to continue the hearing, and indeed, as set forth below, the truth does not support the
4 pending request. The Court should not reward their false statements by postponing the hearing.

5 **III. CONCLUSION**

6 For the foregoing reasons, AMCO respectfully requests that the Court deny Plaintiff's
7 ex parte request to continue the hearing on AMCO's motion for summary judgment or, in the
8 alternative, partial summary judgment.

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10 Dated: June 29, 2007

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